

The Appeals Board finds that this claim should be remanded to the Administrative Law Judge due to an inability to ascertain what the record consists of, both for purposes

of review and for determining what evidence the Administrative Law Judge admitted into the record and/or considered in rendering his decision. The November 15, 1994 Preliminary Hearing transcript contains the following discussion between respondent's counsel and the Court:

"Mr. Burnett: For the record we do have Dr. Burney's deposition scheduled for tomorrow morning at 9:00 a.m. We have also taken Mr. Galvan's discovery deposition. I don't have the transcript from the discovery deposition today, but we should have it within a day or two, but I would like the Court to take under advisement the ruling as to compensability and notice until after we take Dr. Burney's deposition. I will have the transcript expedited tomorrow morning so that you will get it within three days or so, but I believe that is part of the evidence you will need to consider.

The Court: And the deposition of the claimant, also?

Mr. Burnett: Yes." (Prel. H., p. 5 lines 20-25 and p. 6 lines 1-12)

The file contains the transcript of the deposition of William Warren Burney II, M.D., taken on behalf of the respondent on November 21, 1994. Although the pleadings include a Notice to Take Deposition of Markus Galvan on November 2, 1994, no transcript of that deposition is in the file. It is apparent from the above discussion between counsel for the respondent and the Court at the November 15, 1994 Preliminary Hearing that the discovery deposition of claimant had been taken and that respondent intended to submit the transcript of that deposition into evidence for the Court's consideration as a part of the Preliminary Hearing record. It also appears that the Court granted respondent's request to introduce that deposition testimony. There was no objection made by claimant to that request, nor was there a time limit imposed upon respondent for providing the deposition transcript. It is apparent from the briefs of both claimant and respondent submitted to the Appeals Board in connection with this appeal that both parties assumed the deposition of claimant was a part of the record, because both make reference to it in their briefs. We can only assume that the respondent's cross-examination of claimant at the preliminary hearing was conducted with the understanding that his deposition testimony would be a part of the record and considered by the Administrative Law Judge in his decision. It does not appear that it was in fact considered by the Administrative Law Judge, but this cannot be determined because there is no recitation in the December 14, 1994 Order as to what record was considered.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that this proceeding should be, and hereby is, remanded to the Administrative Law Judge for an order containing additional findings or statement of the record considered by the Administrative Law Judge in making his December 14, 1994 Order, or for such subsequent and further order as the Administrative Law Judge may enter should there be additional evidence which the Administrative Law Judge desires to consider. The Appeals Board does not maintain jurisdiction over this matter and the parties must file a new application for review and follow the appropriate procedures, should they be aggrieved, after they receive the additional findings and order from the Administrative Law Judge.

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul D. Hogan, Wichita, KS
Vincent A. Burnett, Wichita, KS
John D. Clark, Administrative Law Judge
George Gomez, Director